YAP TECK SOON

v.

ARAB-MALAYSIA CREDIT BERHAD

HIGH COURT, JOHOR BAHRU
TUAN HAIDAR BIN MOHD NOOR J.
[CIVIL APPEAL NO. 12-42-1991]
1 NOVEMBER 1993

PRACTICE AND PROCEDURE: Judgement in default of appearance - Application to set aside - Order 28 r. 8, Subordinate Courts Rules 1980 - Whether Order applicable only to trials - Whether Order applied to judgement and order in all proceedings - Time for filing - Rule 8(2) - Whether imperative in nature - Whether non-compliance thereof fatal to application.

WORDS AND PHRASES: "Any judgement or order" - Order 28 r. 8, Subordinate Courts Rules 1980.

This was an application by the appellant against the judgement of the Sessions Judge, Johor Bahru for dismissing his application under O. 28 r. 8 of the Subordinate Courts Rules 1980 (SCR). The facts were that on 7 August 1989 the learned Sessions Judge made an order extending the validity of summons and statement of claim of the respondent and on 18 December 1989 judgement in default of appearance was entered against the appellant in respect of that suit. About two years later, i.e. on 27 August 1991, the appellant filed application to the same Court and applied for the striking out of the said order of Court and default judgement. The application was dismissed by the learned Sessions Judge on the ground that the appellant had failed to comply with O. 28 r. 8(2) of SCR since the application was not filed within the 14-day period prescribed in r. 8(2) thereof.

The appellant appealed against the judgement and argued that O. 28 r. 8 of SCR applied to cases where pleadings were closed and that it had no application to the appellant's case where default of appearance judgement was given.

Held:

[1] The phrase "any judgement or order" in O. 28 r. 8 of the Subordinate Courts Rules 1980 refers to all judgements or orders in all proceedings and not only confined to "trials" as contended by the appellants. The appellant is therefore caught by O. 28 r. 8(2) of the Subordinate Courts Rules 1980 as he failed to apply for extension of time under O. 3 r. 5 of the SCR. In the event the application was not properly before the Sessions Court and its dismissal by the said Court was not improper.

[Appeal dismissed].

Case referred to:

Latchman Singh & Sons v. Tan Kian [1991] 1 CLJ ***(refd)***

Legislation referred to:

Rules of the High Court 1980, O. 13 r. 8, O. 19 r. 9, O. 35 r. 2(1), (2)

Subordinate Courts Rules 1980, O. 1 r. 6(1), O. 3 r. 5, O. 28 r. 8(1), (2)

For the appellant - H.L. Phang; M/s. C.C. Aiyathurai & Co.

For the respondent - S.T. Law; M/s. Abdul Raman Saad & Associates

JUDGMENT

Haidar Bin Mohd Noor J:

This is an appeal against the judgment of the learned Sessions Court Judge given on 19 September 1991 whereby the application of the 4th. defendant (appellant) was dismissed with costs.

The appellant filed the application on 27 August 1991 (page 11 of the Record) for an order that the followings be set aside:

(i) the order of Court dated 7 August 1989 (extension of validity of summons and statement of claim);
(ii) the default judgment dated 18 December 1989 against the 4th defendant;
(iii) the summons dated 17 July 1986 and the statement of claim dated 16 July 1986;
(iv) the service of the summons and statement of claim on the 4th defendant; and
(v) all subsequent proceedings.

The grounds of the application are -

(i) the learned Sessions (Court) Judge has no power to grant to the plaintiff the order of Court dated 7 August 1989.
(ii) the said order is a nullity.

The application is supported by by the affidavit of Mr. Pang Hok Liong, the solicitor acting for the appellant.

The respondent did not file any affidavit in reply contending that they are relying on points of

law. The respondent contended, *inter alia*, that the appellant filed the application out of time as O. 28 r. 8 (2) of the Subordinate Courts Rules 1980 (SCR) prescribes that such an application must be made within 14 days after the hearing. For convenience, I reproduce r. 8 of O. 28 of SCR:

> 8(1) Any judgment or order obtained where one party does not appear at the hearing may be set aside by the Court, on the application of that party, on such terms as it thinks just.
> (2) An application under this rule must be made within 14 days after the hearing.

The learned Counsel for the appellant, before me, submitted that O. 28 r. 8 of SCR applies to cases where pleadings are closed and it has no application to the appellant's case where default of appearance judgment was given.

In this appeal, I should firstly consider whether O. 28 r. 8 of SCR is applicable to the appellant's case. This issue was considered by the learned Sessions Court Judge at page 8 of the Appeal Record.

In the interpretation of O. 28 r. 8 (2) of SCR, the learned Sessions Court Judge relied on the case of *Latchman Singh & Sons v. Tan Kian* [1991] 1 CLJ where at p. 131, Wan Yahya bin Pawan Teh J. (as he then was) said:

> But in an application under the Subordinate Court Rules, the applicant must primarily satisfy the court that he has good reasons for not acting within the prescribed time before proceeding to establish the other two requirements.

The other two requirements referred to by the learned Judge are - applicant has to satisfy the Court by firstly explaining the reason for his absence and his failure to file his defence within the time prescribed and secondly that he has a defence on merits.

The learned Judge in *Latchman Singh & Sons*' case considered O. 13 r. 8 and O. 19 r. 9 of the Rules of the High Court 1980 (RHC) by way of comparison when his Lordship went on to conclude that O. 28 r. 8(2) of SCR imposed an imperative time limit within which the application must be made. The relevant order under RHC that appears to have similar wordings as O. 28 r. 8 of SCR is O. 35 r. 2 of RHC which reads:

> 2(1) Any judgment or order obtained where one party does not appear at the **trial** may be set aside by the Court, on the application of that party, on such terms as it thinks just.
> (2) An application under this rule must be made within 7 days after the **trial**.
> (emphasis is mine)

An examination of O. 28 r. 8 of SCR and O. 35 r. 2 of RHC would show that the word 'hearing' is used in O. 28 r. 8 of SCR whereas in O. 35 r. 2(1) of RHC the word 'trial' is used. The word 'hearing' is defined under O. 1 r. 6 (1) of SCR:

> "hearing" means any proceedings in Court or in Chambers, and the expressions "hear" and "heard" shall be construed accordingly:

I observe that there are no similar provisions as O. 13 r. 8 and O. 19 r. 9 of RHC in the SCR and going by the wordings in O. 28 r. 8 of SCR I am of view that 'any judgment or order' refers to all judgments or orders in all proceedings and not only confined to 'trials' as contended by the learned Counsel for the appellant. In the circumstances I am of the opinion that the appellant is caught by O. 28 r. 8(2) of SCR as he did not firstly apply to the Sessions Court under O. 3 r. 5 of SCR for extension of time. In that event the application was not properly before the Sessions Court as it was not made within the prescribed time. On this ground alone the appeal should be dismissed and I do so order with costs to the respondent.